RECORD AND BRIEFS

Nos. 16-285, 16-300 and 16-307

IN THE

Supreme Court of the United States

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EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,

v.

STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH, NINTH AND FIFTH CIRCUITS

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONERS IN 16-285 & 16-300 AND IN SUPPORT OF RESPONDENTS IN 16-307

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INTEREST OF *AMICI CURIAE*

Amici curiae are or have been distinguished professors of law from several leading law schools across the country ("*Amici* Law Professors"). *Amici* Law Professors have lectured and written extensively on issues of contract law, arbitration, and statutory interpretation. They support the enforcement of arbitration clauses as written and oppose any construction of the National Labor Relations Act ("NLRA") that purports to effectuate a congressional override of the Federal Arbitration Act ("FAA") and bar the enforcement of arbitration agreements in employment contracts. *Amici* Law Professors believe that such a construction of the NLRA is foreclosed by the Court's precedents, *see, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and would run afoul of the FAA and its mandate that "[courts] rigorously enforce agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Amici Law Professors include:

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* No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

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INTRODCUTION AND SUMMARY OF THE ARGUMENT

The Court has recognized the many benefits of arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Moreover, the Court has underscored that, "for parties to employment contracts," these benefits are "real." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001); *see also id.* (rejecting the supposition that "the advantages of the arbitration process somehow disappear when transferred to the employment context"). In light of these benefits, businesses across the country and their employees regularly enter into employment contracts that provide for the arbitration of any disputes. *See id.* at 123; *see also* Brief for the Petitioners, *Ernst & Young LLP v. Morris*, No. 16-300 ("E&Y Brief") at 5-6 (citing Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 84 (1996)). And, as Petitioner Epic Systems and Respondent Murphy Oil point out, these contracts "often include waivers of class or collective proceedings," Br. for Pet. Epic Systems and Resp. Murphy Oil ("Epic/Murphy Br.") at 1, undoubtedly to ensure "the principal advantage of arbitration—its informality," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

The question presented is whether—notwithstanding the prevalence of arbitration agreements in the employment context and the many benefits thereof—the National Labor Relations Act

("NLRA") prohibits the enforcement under the Federal Arbitration Act ("FAA") of a contract requiring an employee to arbitrate claims against an employer on an individual basis.

Amici Law Professors agree with Petitioners in Nos. 285 and 300 and Respondents in No. 307 that the answer to this question is no. Because Congress did not in the NLRA clearly express an intention to override the FAA and preclude the enforcement of arbitration agreements in employment contracts, the FAA requires enforcement of the arbitration agreements at issue. *See* E&Y Br. at 26-32; Epic/Murphy Br. at 29-49. *Amici* Law Professors write separately to emphasize that the standard for demonstrating that another federal statute constitutes a "clear congressional override" of the FAA is an exacting one.

ARGUMENT

I. The FAA Requires Courts to Enforce Agreements to Arbitrate Federal Statutory Claims Unless the FAA's Mandate Has Been Overridden by a Contrary Congressional Command.

Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The statute "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'" *Scherk v. Alberto-Culver Co.*, 417

U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

The "centerpiece" of the FAA is Section 2. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). It provides:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This provision declares "as a matter of federal law," *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483 (1989), that "arbitration agreements [are] 'valid, irrevocable, and enforceable' as written," *Concepcion*, 563 U.S. at 344 (quoting 9 U.S.C. § 2).

The FAA and Section 2 thus embody an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (citation and quotations omitted), and establish "a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *see also Mitsubishi Motors*, 473 U.S. at 625 (explaining that the FAA and Section 2 outline "a policy guaranteeing the enforcement of private contractual arrangements"). This Court has recognized as much, having stated "on numerous

occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A.*, 559 U.S. at 682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (other citations omitted)). In short, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 221.

Importantly, "[t]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also Gilmer*, 500 U.S. at 26 ("[S]tatutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."). Any "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. The FAA's mandate is fully enforceable, then, "even when the claims at issue are federal statutory claims." *CompuCredit*, 132 S. Ct. at 669. An arbitration agreement, like any other contract, may be vitiated by a showing of "fraud or excessive economic power." *McMahon*, 482 U.S. at 226. But absent that, the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims

by skewing the otherwise hospitable inquiry into arbitrability." *Id.*

To be sure, "like any statutory directive, the [FAA]'s mandate may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. But this is an exacting standard. The "contrary congressional command" must be clearly expressed; another federal statute may not override the FAA unless the "qualification" is "found in its text." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009). Thus, if the other statute is "silent on whether claims ... can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 273; *see also Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("[A]bsent a clear statement in a federal statute showing Congressional intent to override the use of arbitration, the FAA prevails.").

The rule that a federal statute will not be interpreted to forbid arbitration of claims within its ambit unless it does so *expressly* follows from ordinary principles of statutory construction. As explained above, the right the FAA protects is unambiguously outlined in the statutory text: the right to judicial enforcement of arbitration agreements as written. Courts are appropriately reluctant to read another federal statute to defeat that right. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535,

551 (1974); *see also Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) ("We should read federal statutes 'to give effect to each if we can do so while preserving their sense and purpose.'") (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

A court's duty to reconcile two laws "to give effect to each," *Watt*, 451 U.S. at 267, is especially important when, as here, there is a claim that a more recent statute has superseded an older one. Repeals by implication are "strongly disfavored." *United States v. Fausto*, 484 U.S. 439, 452 (1988); *see also Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). "A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (citations and quotations omitted); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945) ("clear repugnancy"); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("irreconcilable conflict") (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982)). Naturally, then, it is "strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. Accordingly, for a new statute to supersede an existing one, "the intention of the legislature to repeal must be clear and manifest." *Town of Red Rock v. Henry*, 106 U.S. 596, 602 (1883). Another federal statute may not override that body of substantive law unless the "qualification" is "found in its text." *Penn Plaza*, 556 U.S. at 270.

II. The Court's Decisions Demonstrate that the Standard for a Congressional Override of the FAA is an Exacting One.

The "contrary congressional command" rule is straightforward. If Congress enacts a statute that expressly precludes or limits arbitration of certain federal claims, the new law prevails over the FAA.

Congress knows how to override the FAA, having done so on several occasions. In 2002, for example, Congress provided that "whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2).

More recently, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended several statutes to bar the enforcement of predispute arbitration agreements as to claims arising thereunder. *See, e.g.*, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.") (Commodity Exchange Act); 12 U.S.C. § 5567(d)(2) (same) (Consumer Financial Protection Act); 18 U.S.C. § 1514A(e)(2) (same) (Sarbanes-Oxley Act). Also in 2010, Congress expressly conferred upon the Consumer Financial Protection Bureau ("CFPB") certain "[a]uthority to restrict mandatory pre-dispute arbitration." 12 U.S.C. § 5518 (section title); *see also* 12 U.S.C. § 5518(b) (authorizing the CFPB to

"impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers").

As these examples demonstrate, "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be held unenforceable.'" *Penn Plaza*, 556 U.S. at 270 (quoting *Mitsubishi Motors*, 473 U.S. at 627). If Congress does not expressly override the FAA, however, then the federal statute cannot be construed to abrogate or amend the parties' arbitration agreement.

Importantly, the burden rests with the party opposing arbitration "to show that Congress intended to preclude a waiver of a judicial forum for [the federal] claims [at issue]." *Gilmer*, 500 U.S. at 26; *see also id.* ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). And as Petitioner Ernst & Young emphasizes, "this Court's decisions demonstrate [that] the burden of proving that a federal statute displaces the Arbitration Act is a heavy one." E&Y Br. at 22.

Take, for example, *Mitsubishi Motors*. That case involved a purported conflict between the FAA and a provision of the Clayton Act, which states that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act," the Court explained, "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627. Because the Clayton Act evinced no such congressional intent, that was the end of the matter. As the Court explained, any "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read." *Id.*

The Court's FAA decisions relating to the Age Discrimination in Employment Act ("ADEA") track the same path. Under the ADEA, "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1). The Supreme Court twice has held that this statutory text does not abrogate an employment agreement—whether bargained for collectively or individually—that requires individual arbitration of ADEA claims. *See Gilmer*, 500 U.S. at 26-27; *Penn Plaza*, 556 U.S. at 258-260.

In *Gilmer*, the Supreme Court emphasized that "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless

Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26. The Court concluded that the ADEA did not override the FAA because "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id.* at 26; *see also id.* at 29 ("[I]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.").

In *Penn Plaza*, the Supreme Court reaffirmed this construction of the ADEA and then took it one step further. After *Gilmer*, Congress had amended the ADEA to provide that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). On top of that, the legislative history included a statement that "any agreement to submit disputed issues to arbitration ... in the context of a collective bargaining agreement ... does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 102-40(1), at 97 (1991). The Court held that the amended ADEA still did not amount to a contrary congressional command. Even assuming that the amendment's legislative history expressed a congressional desire to curtail arbitration in the collective-bargaining setting, the Court refused to find a contrary congressional command to override the FAA in the absence of textual proof. *See Penn Plaza*, 556 U.S. at 259 n.6.

The Court's most recent decision in this area—*CompuCredit v. Greenwood*—is perhaps the best illustration of the high bar that a party challenging an arbitration agreement must meet to prove that Congress intended to override the FAA. In *CompuCredit*, credit-card holders who sued their card providers under the Credit Repair Organizations Act (CROA) argued that the CROA overrode the FAA and precluded enforcement of their otherwise-binding arbitration agreements. The cardholders argued that the CROA's provision requiring disclosure of the cardholder's right to sue together with a substantive non-waiver provision created a non-waivable right to bring class claims in a judicial forum. *See CompuCredit*, 132 S. Ct. at 670. But the Court rejected this argument, explaining that even this express language could not "do the heavy lifting" needed to override the FAA and confer not only a substantive right to a cause of action, but also a non-waivable right to a judicial forum. *Id.* "It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit," the Court further explained. *Id.* "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id.* (citation omitted). Put simply, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far

exceeds the claimed indications in the CROA." *Id.* at 672.

Justice Sotomayor's separate concurring opinion in *CompuCredit* (joined by Justice Kagan) further highlights the exacting standard for demonstrating a congressional override. In their view, the override question was a close one; the concurrence characterized the cardholder's position as "plausible." *Id.* at 675. But, of course, plausibility is not sufficient. Nor was it enough that Justice Sotomayor concluded that "the parties' arguments [were] in equipoise." The standard for an override "require[s] that petitioners prevail in this circumstance." *Id.*

* * *

As the Court's precedents make clear, the standard for a congressional override of the FAA is an exacting one. For the reasons outlined by Petitioners in Nos. 285 and 300 and Respondents in No. 307, the NLRA does not come close to meeting this standard. *See* E&Y Br. at 32 ("Neither the text, legislative history, nor the underlying purposes of the NLRA reveal anything even approaching a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically.").

Simply put, there is no "qualification ... found in [the] text" of the NLRA capable of overriding the FAA. *Penn Plaza*, 556 U.S. at 270.

CONCLUSION

The judgments of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgments of the Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Ernst & Young* should be reversed.

Respectfully submitted,

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